Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Boris Sachakov, M.D.
Docket No. A-16-51
Decision No. 2707
June 1, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Boris Sachakov, M.D., appeals a decision by an administrative law judge (ALJ) dismissing Petitioner's request for a hearing to challenge the Office of the Inspector General's (I.G.) determination to not reconsider the length of the 15-year exclusion from Medicare and Medicaid and all Federal health programs that the I.G. imposed against Petitioner on August 30, 2013. *Boris Sachakov, M.D.*, DAB CR Dkt. No. C-16-143, Ruling Dismissing Request for Hearing (Feb. 17, 2016) (ALJ Decision). The ALJ dismissed Petitioner's hearing request on the grounds that it was untimely as to the I.G.'s exclusion determination and that Petitioner had no right to a hearing on the I.G.'s subsequent refusal to reduce the exclusion period it had imposed at the time of the exclusion determination. For the reasons explained below, we affirm the dismissal.

Factual Background[1]

The Exclusion and Petitioner's Request for Reduction of the Exclusion Period

On March 26, 2013, the I.G. wrote Petitioner to notify him of its intent to exclude him from the Medicare, Medicaid and all Federal health care programs (Federal health care programs) under section 1128(a) of the Social Security Act (Act), 42 U.S.C. § 1320a-7(a). P. Ex. 1. The I.G.'s notice letter stated that section 1128(c)(3)(B) of the Act required the I.G. to exclude Petitioner for a minimum period of five years and that the I.G. could impose a longer exclusion if aggravating circumstances warranted. *Id*. at 2. The letter further informed Petitioner that he "ha[d] 30 days from the date of this letter to submit any information and supporting documentation you want the OIG to consider before it makes a final determination regarding your exclusion." *Id*.

[1] The facts stated here are from the ALJ Decision and undisputed facts of record and are not intended as new findings of fact.

On August 30, 2013, the I.G. sent Petitioner written notice of his exclusion from Federal health care programs for a period of 15 years. ALJ Decision at 1, 2; I.G. Ex. 1; P. Ex. 2. The notice letter informed Petitioner that his exclusion was being taken under sections 1128(a)(1) and (3) of the Act (42 U.S.C. § 1320a-7(a)) – which provide for mandatory exclusions – based on his Federal court conviction of 1) a criminal offense related to the delivery of an item or service under Medicare or a State health care program and 2) a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. I.G. Ex. 2, P. Ex. 2. The letter further informed Petitioner that the I.G. had considered the information he had submitted and determined the length of the exclusion (the addition of 10 years to the minimum five) based on evidence of four aggravating factors – his acts caused financial loss to government programs or other entities of more that the regulation's threshold of $5,000, his acts were committed over a period of about two years, he was sentenced to 30 months incarceration and he was subjected to other adverse actions by New York State officials. ALJ Decision at 2; I.G. Ex. 2, P. Ex. 2. The letter also stated that Petitioner had a right to request a hearing before an ALJ, that any such request must be filed "within 60 days of receiving the [I.G.'s] notice [of exclusion]" and that "[t]he date you receive the [I.G.'s] notice of exclusion will be presumed to be five (5) days after the date of such notice unless there is a reasonable showing to the contrary." ALJ Decision at 2; I.G. Ex. 1, at 4; P. Ex. 2, at 4.

On August 31, 2015, approximately two years after the date of the exclusion letter, Petitioner, through counsel, wrote the I.G. seeking a reduction of the exclusion period based on alleged mitigating factors.[2] ALJ Decision at 3; P. Ex. 11, at 1-2. Petitioner's letter asserted that although the I.G.'s March 26, 2013 letter notified Petitioner of the pending exclusion, discussed the minimum period of exclusion the I.G. could impose and provided information about potential waivers of exclusion, it did not provide information about submitting evidence relating to mitigation. P. Ex. 11, at 1. The letter went on to discuss what Petitioner considered mitigating factors that "could have been provided had the pending exclusion letter mentioned that" and stated that "Dr. Sachakov is asking that these factors be considered now (*nunc pro tunc*) and that they be weighed against the aggravating factors with the obvious conclusion that they be used to reduce the exclusion." *Id*. at 1-2. On October 28, 2015, the I.G. notified Petitioner that after reviewing his letter of August 31, 2015, the materials accompanying the letter and the original investigative file, the I.G. had "determined that the exclusion period assessed to Dr. Sach[a]kov should remain unchanged." I.G. Ex. 2; P. Ex. 12.

[2] Petitioner's request followed a series of emails between Petitioner and the I.G. in which Petitioner asked and the I.G. answered questions about various aspects of the exclusion. *See* P. Exs. 3-10.

The ALJ Proceeding

On December 1, 2015, Petitioner filed a hearing request seeking to challenge the I.G.'s October 28, 2015 determination not to change the exclusion period. ALJ Decision at 1. The I.G. moved to dismiss the hearing request on the ground Petitioner had no right to a hearing on the I.G.'s post-exclusion decision not to reduce the length of the exclusion. *Id*. Following briefing on the motion, the ALJ granted the motion and dismissed the hearing request. *Id*. The ALJ concluded that only the determinations enumerated at 42 C.F.R. Parts 1001 and 1003 were appealable I.G. determinations and that these "confer no right to file a hearing request to challenge an I.G. conclusion, made subsequent to the issuance of an exclusion determination, not to modify or reduce the length of exclusion. That is a discretionary action by the I.G. that is not reviewable." *Id*. at 3. The ALJ also rejected Petitioner's alternative argument that he had good cause for not requesting a hearing within 60 days of receiving the exclusion notice because the notice did not advise him that he could raise any mitigating factors on appeal. *Id*. at 2; *see also* Petitioner's Response to the Motion to Dismiss at 5-8. The ALJ concluded that the exclusion notice "plainly advised Petitioner of his rights" and "was not materially misleading" and that "[t]he I.G. was under no duty to advise Petitioner of any possible defenses that he might raise." ALJ Decision at 2.[3]

Petitioner filed the instant appeal of the ALJ Decision. In his Notice of Appeal (NA) Petitioner argues that the ALJ "incorrectly stated that the I.G.'s decision dated October 28 2015 'was not an exclusion determination but rather, a refusal to revisit an exclusion determination.'" NA at 2. More particularly, Petitioner argues that the I.G.'s rejection of his request for a reduction of the exclusion period was a determination subject to appeal because the I.G. agreed to review the materials he submitted and then denied the request. NA at 2-3. In his reply brief, Petitioner argues more expansively that "[t]he I.G.'s offer to accept a request for reconsideration of the length of the exclusion and the acceptance and consideration of it granted Dr. Sachakov those rights he possessed as of the time of original notice of exclusion and resulted in the right to appeal the I.G.'s decision of October 2015 as though it was an appeal from the original imposition of the exclusion, meaning he had those rights *nunc pro tunc*." Reply at 5.

Standard of Review

The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. 42 C.F.R. § 1005.21(h). The standard of review on a disputed issues of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole.

[3] In his appeal to the Board, Petitioner does not challenge the ALJ's rejection of this alternative argument; accordingly, we affirm that portion of the ALJ Decision without further discussion.

Id., *see also Guidelines – Appellate Review of Decisions of Administrative Law Judges in Cases to Which Procedures in 42 C.F.R. Part 1005 Apply* (available at http://www.hhs.gov/dab/divisions/appellate/guidelines/procedures.html).

Discussion

Section 1128(a) of the Act provides for mandatory exclusions, that is, it requires the I.G. to exclude individuals, such as Petitioner, who have been convicted of certain types of criminal offenses. 42 U.S.C. § 1320a-7(a); 42 C.F.R. § 1001.101. An individual excluded under section 1128(a) has a right to reasonable notice and an opportunity for a hearing. 42 U.S.C. § 1320a-7(f)(1); 42 C.F.R. §§ 1001.2002, 1001.2007, 1005.2. However, the regulations require that an appeal from an I.G. exclusion determination be filed no later than 60 days after receipt of the exclusion notice. 42 C.F.R. §§ 1001.2007(b), 1005.2(c). They further provide that "the date of receipt of the notice will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary." 42 C.F.R. § 1005.2(c). In a timely requested exclusion hearing under section 1128(a) of the Act, the only issues that may be addressed are: (1) whether a basis for imposition of the sanction exists; and (2) whether the length of the exclusion is unreasonable. 42 C.F.R. § 1001.2007(a)(1).

Petitioner does not dispute, and the record confirms, that he filed no appeal of the I.G.'s August 30, 2013 determination to exclude him within 60 days of receiving the written notice of that exclusion. Petitioner also does not dispute, and the record confirms, that the I.G.'s notice letter informed Petitioner of his right to appeal and the 60-day time limit for doing so. P. Ex. 2, at 4. Had Petitioner timely appealed the exclusion, he could have challenged the basis for the exclusion and the length of the exclusion. 42 C.F.R. § 1001.2007(a). However, Petitioner did not file a timely appeal from the I.G.'s exclusion determination. Instead, approximately two years later, his attorney wrote the I.G. asking for a reduction in the length of Petitioner's exclusion. The I.G. considered but denied the request in a letter dated October 28, 2015. The ALJ correctly concluded that Petitioner had not timely appealed the exclusion and had no right to a hearing on the I.G.'s denial of Petitioner's post-exclusion request to reduce Petitioner's exclusion period.

The regulations governing appeals from I.G. exclusions provide, "The ALJ <u>will dismiss</u> a hearing request where– (1) The . . . hearing request is not filed in a timely manner[.]" 42 C.F.R. § 1005.2(e)(1) (emphasis added). The ALJ concluded that the language "will dismiss" and the absence of any stated exceptions means that an ALJ "must dismiss any hearing request that is untimely filed." ALJ Decision at 2. The ALJ's conclusion that section 1005.2(e)(1) mandates dismissal of an untimely hearing request is correct. *Kenneth Schrager*, DAB No. 2366, at 3 (2011); *Gary Grossman*, DAB No. 2267, at 5 (2009).

Petitioner nonetheless argues that the ALJ erred in dismissing the hearing request he filed on December 1, 2015, because it was filed within 60 days of receiving the I.G.'s denial of his request – made two years after his exclusion – to reduce the exclusion period. As stated above, Petitioner argues that the ALJ "incorrectly stated that the I.G.'s decision dated October 28, 2015 'was not an exclusion determination but, rather, a refusal to revisit an exclusion determination.'" NA at 2. Petitioner asserts that the ALJ's statement is a mischaracterization of the I.G.'s action since the I.G. did consider the documents and arguments his counsel submitted in 2015 and did not decline to rule on his request to reduce the exclusion period but, rather, decided not to change it. NA at 2-3. Importantly, Petitioner does not go on to assert that the I.G.'s administrative action was a new exclusion action, which, of course, would be baseless since the I.G.'s 2015 decision did not exclude him but merely left the previously imposed 15-year period of exclusion intact. However, Petitioner asserts that the I.G.'s 2015 administrative action denying his request to change the exclusion period allowed him to appeal the 2013 exclusion by filing an appeal within 60 days of receiving notice of the I.G.'s administrative action, even though the I.G.'s letter informing him of the denial stated no appeal rights. Petitioner asserts:

> The I.G.'s offer to accept a request for reconsideration of the length of the exclusion and the acceptance and consideration of it granted Dr. Sachakov those rights he possessed as of the time of original notice of exclusion and resulted in the right to appeal the I.G.'s decision of October 2015 as though it was an appeal from the original imposition of the exclusion, meaning he had those rights *nunc pro tunc*.

Reply at 5.

The ALJ correctly rejected this argument as having no support in the law governing appeal rights in exclusion proceedings. As the ALJ said, "[o]nly certain actions by the I.G. create hearing rights" and "[t]hese appealable determinations are enumerated at 42 C.F.R. Parts 1001 and 1003." ALJ Decision at 3; *see* 42 C.F.R. § 1005.2(a) ("A party sanctioned under any criteria specified in parts 1001, 1003 and 1004 of this chapter may request a hearing before an ALJ."). The only hearing right that is relevant here is the right to a hearing on a sanction – an exclusion – imposed by the I.G. under Part 1001.[4] That hearing right is further circumscribed by section 1001.2007(a)(i), (ii) which limits the issues that can be raised in the appeal of an exclusion under Part 1001 as follows:

[4] Parts 1003 and 1004 are not relevant here because they address, respectively, the I.G.'s authority to impose Civil Money Penalties and sanctions imposed by quality improvement organizations.

> Except as provided in [an enumerated section not relevant here], an individual or entity excluded under this part may file a request for a hearing by an ALJ only on the issues of whether:
> (i) The basis for the imposition of the sanction exists, and
> (ii) The length of exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1)(i), (ii) (emphasis added). Both section 1005.2(a) (which specifies appeal rights for Part 1001 exclusions) and section 1001.2007(a)(1)(i), (ii) (which specifies the issues that can be heard in such an appeal) identify appeal rights as arising from the "sanction" imposed by the I.G., that is, the exclusion, not from the I.G.'s determination of the length of the exclusion. During a timely requested hearing – that is, a hearing requested within 60 days of receipt of the I.G.'s exclusion notice – the petitioner may dispute the length of the exclusion as well as or in lieu of disputing the basis for the exclusion. However, absent the imposition of the sanction of exclusion, there is no issue as to the length of the exclusion and no basis for appeal.

Thus, the I.G.'s 2015 administrative action, which addressed only the length of Petitioner's 2013 unappealed exclusion, did not state any appeal rights and had no legal capacity to convey either a prospective right to appeal the administrative action or a retroactive right to appeal the 2015 exclusion by extending or reinstating the time to appeal. As stated above, Petitioner does not allege that the 2015 administrative action itself was appealable. Nor does Petitioner cite any authority for his proposition that the I.G. somehow extended or reinstated his right to appeal the exclusion he failed to appeal some two years earlier simply because it considered the arguments and documents Petitioner submitted in 2015 and decided not to change the exclusion period.[5] We conclude, as did the ALJ, that this argument is not consistent with the limited appeal rights provided in the regulations. The I.G. could not expand or modify appeal rights codified in the regulations – nor did it purport to do so – simply by considering Petitioner's post-exclusion request to reduce the period of exclusion imposed for his unappealed exclusion.

[5] Petitioner attempts to distinguish several ALJ decisions the I.G. cited as showing that administrative actions other than determinations to impose exclusions, such as denials of request for reinstatement or requests to have an exclusion period reduced *post facto*, are not subject to ALJ review. *See* I.G. Response at 5 (citations omitted). However, Petitioner cites no authority affirmatively supporting its position. We do not discuss the decisions cited by the I.G. since ALJ decisions do not bind the Board or other ALJs, and we have no need to cite case law because our rejection of Petitioner's argument and our conclusion that the ALJ properly dismissed Petitioner's hearing request are based on the authority of the regulations.

Conclusion

For the reasons stated above, we conclude that the ALJ was required to dismiss Petitioner's request for a hearing and accordingly we affirm the dismissal.

/s/
Leslie A. Sussan

/s/
Christopher S. Randolph

/s/
Sheila Ann Hegy
Presiding Board Member